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**25 YEAR RE-REVIEW**

**OGC/LEG Review Completed.**

96TH CONGRESS  
1ST SESSION

**S. 695**

To amend title 28 of the United States Code to provide for an exclusive remedy against the United States in actions based upon acts or omissions of United States employees, and to amend title 5 of the United States Code to permit a person injured by a constitutional tort to initiate and participate in a disciplinary inquiry of the offending act or omission, and for other purposes.

**IN THE SENATE OF THE UNITED STATES**

MARCH 15 (legislative day, FEBRUARY 22), 1979

Mr. KENNEDY introduced the following bill; which was read twice and referred to the Committee on the Judiciary

**A BILL**

To amend title 28 of the United States Code to provide for an exclusive remedy against the United States in actions based upon acts or omissions of United States employees, and to amend title 5 of the United States Code to permit a person injured by a constitutional tort to initiate and participate in a disciplinary inquiry of the offending act or omission, and for other purposes.

1. Be it enacted by the Senate and House of Representa-

2 tives of the United States of America in Congress assembled,

3 That section 1346(b) of title 28, United States Code, is

4 amended by striking the period at the end of the section and

1 adding the following: " or where the claim sounding in tort  
2 for money damages arises under the Constitution of the  
3 United States when such employee of the Government is  
4 acting within the scope of his office or employment, or under  
5 the color thereof, such liability to be determined in accord-  
6 ance with applicable Federal law."

7 SEC. 2. Section 2672 of title 28, United States Code, is  
8 amended in the first paragraph—

9 (1) by inserting after "occurred" the following: " or  
10 where the claim sounding in tort for money dam-  
11 ages arises under the Constitution of the United States  
12 when such employee of the Government is acting  
13 within the scope of his office or employment, or under  
14 the color thereof, such liability to be determined in  
15 accordance with applicable Federal law"; and

16 (2) by inserting after "\$25,000" the following:  
17 "or any award, compromise, or settlement based on a  
18 claim arising under the Constitution of the United  
19 States".

20 SEC. 3. Section 2674 of title 28, United States Code, is  
21 amended—

22 (1) by inserting after "claims" in the first para-  
23 graph the following: "based upon negligent or wrongful  
24 acts or omissions";  
25 (2) by inserting "(a)" before the first paragraph;

1. (b) (3) by inserting "(b)" before the second para-  
2. graph; and (b) section 2672(d) by adding the following to it:

3. (4) by adding at the end the following new sub-  
4. section: "Interest and Punitive Damages"

5. "(c)(1) The United States shall be liable, respecting the  
6. provisions of this title relating to tort claims arising under the  
7. Constitution of the United States, to the extent as recognized  
8. or provided by applicable Federal law, but shall not be liable  
9. for interest prior to judgment or for punitive damages."

10. "(2) Damages in any such case shall be actual damages  
11. but may not be less than liquidated damages computed at the  
12. rate of \$100 a day for each day of violation or \$1,000,  
13. whichever is higher, up to a maximum of \$15,000, plus a  
14. reasonable attorney's fee and other litigation costs reasonably  
15. incurred. Attorney's fees or costs attributable to processing  
16. an administrative claim filed under section 2672 of this title  
17. are not included."

18. "(3) The United States shall not assert as a defense to a  
19. tort claim arising under the Constitution of the United  
20. States, the absolute or qualified immunity of the employee  
21. whose violation is complained of or his reasonable good faith  
22. belief in the lawfulness of his conduct, except that the United  
23. States may assert such a defense if the violation complained  
24. of is that of a Member of Congress, a judge, a prosecutor, or  
25. a person performing analogous functions."

1 SEC. 4. Section 2675(a) of title 28, United States Code,  
2 is amended—  
3 (1) by inserting after "employment" the following:  
4 "or upon a claim against the United States for money  
5 damages for a tort arising under the Constitution of  
6 the United States caused by the negligent or wrongful  
7 act or omission of any employee of the Government  
8 while acting within the scope of his office or employ-  
9 ment, or under the color thereof"; and  
10 (2) by striking out the period at the end thereof  
11 and inserting in lieu thereof a semicolon and the fol-  
12 lowing: "except that class actions in conformity with  
13 the requirements of the Federal Rules of Civil Proce-  
14 dure may be instituted for money damages for a tort  
15 arising under the Constitution of the United States  
16 only if (1) the claim presented to the appropriate Fed-  
17 eral agency under this section expressly asserts the  
18 representative nature of the claim and specifically de-  
19 scribes the class, the common interests of the claimant  
20 and such class, and the basis upon which the claimant  
21 believes he can fairly and adequately protect the inter-  
22 ests of the class as their representative, and (2) if oth-  
23 erwise deemed appropriate by the court before which  
24 the action is filed. An award for liquidated damages for  
25 any one class may not exceed \$1,000,000."

1 SEC. 5. Section 2678 of title 28, United States Code, is  
2 amended by striking out "No" at the beginning of the first  
3 paragraph and inserting in lieu thereof the following:  
4 "Except as otherwise provided by section 2674(c) of this  
5 title, no"

6 SEC. 6. Section 2679(b) of title 28, United States Code,

7 is amended to read as follows:

8 "(b)(1) The remedy against the United States provided  
9 by sections 1346(b) and 2672 of this title for claims for injury  
10 or loss of property or personal injury or death resulting from  
11 the negligent or wrongful act or omission of any employee of  
12 the Government while acting within the scope of his office or  
13 employment and for such claims arising under the Constitu-  
14 tion of the United States resulting from the negligent or  
15 wrongful act or omission of any employee of the Government

16 while acting within the scope of his office or employment, is  
17 exclusive of any other civil action or proceeding arising out of  
18 or relating to the same subject matter against the employee  
19 whose act or omission gave rise to the claim, or against the  
20 estate of such employee.

21 "(2) In no event shall a claim for a tort arising under  
22 the Constitution of the United States resulting from the neg-  
23 ligent or wrongful act or omission of any employee of the  
24 Government while acting solely under color of his office or  
25 employment, lie against both the employee in his individual

1 capacity and against the United States under sections  
2 1346(b) and 2675 of this title."

3 SEC. 7. Section 2679(d) of title 28, United States Code,  
4 is amended to read as follows:

5 "(d)(1) Upon certification by the Attorney General that

6 the defendant employee was acting within the scope of his  
7 office or employment, or that he was acting solely under the  
8 color of his office or employment, at the time of the incident  
9 out of which the action arose, any such civil action or pro-

10 ceeding commenced in a United States district court shall be

11 deemed an action against the United States under the provi-  
12 sions of this title and all references thereto, and the United

13 States shall be substituted as the party defendant, unless  
14 within ten days after notification that the Attorney General  
15 has certified that the defendant employee was acting solely

16 under color of his office or employment, the plaintiff notifies  
17 the court of his election to proceed only against the defendant

18 employee. After such substitution, the United States shall

19 have available all defenses to which it would have been enti-  
20 tled if the action had originally been commenced against the  
21 United States under this chapter and section 1346(b) of this  
22 title.

23 "(2) Upon certification by the Attorney General that the  
24 defendant employee was acting within the scope of his office  
25 or employment, or that he was acting solely under the color

1 of his office or employment, at the time of the incident out of  
2 which the action arose, any such civil action or proceeding  
3 commenced in a State court shall be removed without bond  
4 at any time before trial by the Attorney General to the dis-  
5 trict court of the United States of the district and division  
6 embracing the place wherein it is pending. Such action shall  
7 be deemed an action brought against the United States under  
8 the provisions of this title and all references thereto, and the  
9 United States shall be substituted as the party defendant,  
10 unless within ten days after notification that the Attorney  
11 General has certified that the defendant employee was acting  
12 solely under color of his office or employment, the plaintiff  
13 notifies the district court of his election to proceed only  
14 against the defendant employee. After such substitution, the  
15 United States shall have available all defenses to which it  
16 would have been entitled if the action had originally been  
17 commenced against the United States under this chapter and  
18 section 1346(b) of this title. The certification of the Attorney  
19 General shall conclusively establish scope of office or employ-  
20 ment for purposes of such removal.

21 "(3) The certification by the Attorney General under  
22 subsection (d) (1) or (2) that the defendant employee was  
23 acting within the scope of his office or employment, or that  
24 he was acting solely under the color thereof, shall be binding  
25 and conclusive, except that the defendant employee may re-

1    quest the district court of the United States before which the  
2    action has been filed or removed to alter or modify the certifi-  
3    cation or, in the event that the Attorney General has not  
4    made a certification, to find and certify that the employee  
5    was acting within the scope of his office or employment, or  
6    that he was acting solely under the color of his office or  
7    employment.

8        "(4) Where an action or proceeding under this chapter  
9    is precluded because of the availability of a remedy, compen-  
10   sation, or other benefits from the United States as provided  
11   by any other law, the action or proceeding shall be dismissed,  
12   but in that event the running of any limitation of time for  
13   commencing or filing an application or claim in a proceeding  
14   for any other remedy, compensation, or benefits shall be sus-  
15   pended during the pendency of the civil action or administra-  
16   tive proceeding under this chapter."

17   SEC. 8. Section 2679 of title 28, United States Code, is  
18   amended by adding at the end the following new subsection:

19        "(f) If an action or proceeding under section 1346(b) or  
20   2672 of this title arising under the Constitution of the United  
21   States results in a judgment against the United States or an  
22   award, compromise, or settlement paid by the United States,  
23   the Attorney General shall forward the matter to the head of  
24   the department or agency which employed the employee at  
25   the time of the act or omission, for such further administra-

1. tive investigation or disciplinary action as may be appropri-  
2. ate.”

3. SEC. 9. (a) The introductory language to section 2680  
4. of title 28, United States Code, is amended to read as  
5. follows:

6. “(1) The provisions of this chapter and section 1346(b)  
7. of this title shall not apply to—”

8. (b) Section 2680 of title 28, United States Code, is  
9. amended by adding at the end thereof the following new  
10. paragraph:

11. “(2) The provisions of this chapter and section 1346(b)  
12. of this title apply to any tort claim arising under the Consti-  
13. tution of the United States except an action arising from the  
14. activities of the Tennessee Valley Authority, the Panama  
15. Canal Company, a Federal land bank, a Federal intermediate  
16. credit bank, or a bank for cooperatives.”

17. (c) Section 2680(h) of title 28, United States Code, is  
18. amended to read as follows:

19. “(h) Any claim arising out of libel, slander, misrepresen-  
20. tation, deceit, or interference with contract rights.”

21. SEC. 10. (a) Subsections (a) through (d) of section 4116  
22. of title 38, United States Code, are repealed, and subsection  
23. (e) of that section is amended—

24. (1) by striking out the designation “(e)”; and

1           (2) by striking out "person to whom the immunity  
2           provisions of this section apply (as described in subsec-  
3           tion (a) of this section)," and inserting in lieu thereof  
4           "employee of the Department of Medicine and Sur-  
5           gery".

6           (b) Subsections (a) through (c) of section 224 of the  
7           Public Health Service Act are repealed, and subsection (f) is  
8           amended by striking out the designation "(f)".  
9           (c) Subsections (a) through (e) of section 1091 of the  
10          Foreign Service Act of 1946 are repealed.

11          (d)(1) Subsections (a) through (e) of section 1089 of title  
12          10, United States Code, are repealed.

13          (2) Subsection (f) is amended by striking out "person  
14          described in subsection (a)" and inserting in lieu thereof "em-  
15          ployee of the Armed Forces, the Department of Defense, or  
16          the Central Intelligence Agency".

17          (3) Subsection (f) is redesignated as subsection (a), and  
18          subsection (g) is redesignated as subsection (b).

19          (e) Subsections (a) through (e) of section 307 of the Na-  
20          tional Aeronautics and Space Act of 1958 are repealed, sub-  
21          section (f) is amended by striking out the designation "(f)"

22          and by striking out "person described in subsection (a)" and  
23          inserting in lieu thereof "employee of the National Aeronau-  
24          tics and Space Administration".

25          the third of this section.

1 SEC. 11. Section 2520 of title 18, United States Code,  
2 is amended by adding the following paragraph at the end  
3 thereof:

4 "This section shall not apply to any civil cause of action  
5 against an officer or employee of the United States while  
6 acting within the scope of his office or employment, or while  
7 acting under the color of his office or employment."

8 SEC. 12. (a) Title 5, United States Code, is amended by  
9 adding immediately after chapter 77 the following new  
10 chapter:

11 **CHAPTER 78—EMPLOYEE DISCIPLINE**

- 12 "Sec." 1. Notwithstanding any other provision of law, there is hereby added to title 5:  
13  
14 "7801. Definitions.  
15 "7802. Administrative inquiries generally.  
16 "7803. Conduct of employees of the United States.  
17 "7804. Conduct of former employees and Presidential appointees.  
18 "7805. Individuals and bodies conducting inquiries and review.  
19 "7806. Regulations.  
20 "7807. Miscellaneous.

21 **§7801. Definitions**

22 "For the purposes of this chapter, the term—

- 23 "(1) 'agency' means a Federal agency, as defined  
24 in section 2671 of title 28;
- 25 "(2) 'employee', unless otherwise described,  
26 means a present employee of the Government as de-  
27 fined in section 2671 of title 28, other than a uni-  
28 formed member of the Armed Forces;

1        "(3) 'Presidential appointee' means an employee,  
2        other than a Public Health Service officer or a Foreign  
3        Service officer, appointed by the President; ~~notwithstanding~~  
4        "(4) 'disciplinary action' means removal, suspen-  
5        sion without pay, reduction in pay, admonishment or  
6        reprimand, or transfer, for such cause as will promote  
7        the efficiency of the service; and ~~notwithstanding~~  
8        "(5) 'person' means any person with rights recog-  
9        nized under the Constitution of the United States. § 1  
10      "§ 7802. Administrative inquiries generally. Of  
11      "(a) A person who obtains a monetary recovery from  
12      the United States on a tort claim under section 1346(b) or  
13      section 2675 of title 28 arising under the Constitution of the  
14      United States may, within sixty days thereafter, request an  
15      administrative inquiry under this chapter into the conduct al-  
16      leged or found to have given rise to the claim. § 1  
17      "(b) A person who brings an action under section  
18      1346(b) of title 28 on a tort claim arising under the Constitu-  
19      tion of the United States may, not earlier than sixty days nor  
20      more than one hundred and twenty days thereafter, request  
21      an administrative inquiry under this chapter into the conduct  
22      alleged to have given rise to the claim. § 1  
23      "(c) An agency which undertakes to conduct an admin-  
24      istrative inquiry of the conduct of one of its employees may,  
25      in its sole and unreviewable discretion, invite a person who

1 may have been adversely affected by the alleged conduct to  
2 participate in the administrative inquiry to the extent pro-  
3 vided by sections 7803 (b) and (e) of this title.

4 "(d) A person who has requested an administrative in-  
5 quiry under subsection (b) of this section, or who has been  
6 invited to participate in an administrative inquiry under sub-  
7 section (c) of this section, may not subsequently request an  
8 administrative inquiry into the same conduct under subsec-  
9 tion (a) or (b) of this section.

10 "§ 7803. Conduct of employees of the United States

11 "(a) A request under section 7802 (a) or (b) of this title  
12 for an administrative inquiry with respect to the conduct of  
13 an employee of the United States shall be made to the head  
14 of the agency or his designee by which the employee is em-  
15 ployed. The request shall be accompanied by a written state-  
16 ment, certified and subscribed as permitted by section 1746  
17 of title 28, of such facts as are known to the person making  
18 the request regarding the conduct of the employee which is  
19 alleged to have violated such person's rights under the Con-  
20 stitution, and a request may be made with respect to the  
21 conduct of an employee whose identity is unknown if the re-  
22 quest sets forth other information sufficient for the com-  
23 mencement of an inquiry.

24 "(b) The inquiry shall be conducted without unnecessary  
25 delay by the head of the agency or his designee. If after

1 preliminary inquiry the head of the agency or his designee  
2 finds that the matter is so lacking in substance or so unsub-  
3 stantiated as not to warrant further inquiry, he may, upon  
4 notice to the person requesting the inquiry under this section,  
5 terminate such inquiry. A hearing shall be held with respect  
6 to the conduct of the employee if there is a genuine, material,  
7 and substantial dispute of fact which can be resolved with  
8 sufficient accuracy, only by the introduction of reliable evi-  
9 dence in a hearing and the decision of the agency, in the  
10 matter is likely to depend on the resolution of such dispute.  
11 In his sole and unreviewable discretion, the head of the  
12 agency or his designee may give to a person, or an employee;  
13 or both, in the event of a hearing, the opportunity to examine  
14 and cross-examine witnesses, and to suggest witnesses to be  
15 called and documents to be produced. This discretion shall  
16 not be construed to provide access by unauthorized persons  
17 to information specifically protected from disclosure by stat-  
18 ute, or by Executive order relating to national security, na-  
19 tional defense, or foreign affairs. The head of the agency or  
20 his designee shall determine whether disciplinary action is  
21 warranted, issue a statement of findings, including the nature  
22 and degree of disciplinary action taken, and notify the person  
23 requesting the inquiry and the employee of the action taken  
24 by the agency and the reasons therefor: upsi 201 (d).  
25 An inquiry into the conduct of the U.S. employees may,

1        "(c) Except as provided in subsection (e), within sixty  
2        days after notification of the action taken by the agency, or if  
3        no final agency action has been taken within one year after  
4        the inquiry was requested, the person who requested the in-  
5        quiry may seek an administrative review by the appropriate  
6        individual or body described in section 7805(a) of this title.  
7        The individual or body conducting the administrative review  
8        shall determine on the record whether the action taken by  
9        the agency was reasonable. If no final agency action has  
10      been taken, or if the reviewing body or individual is unable to  
11      conduct such review because it finds the record inadequate, it  
12      may remand to the agency for further proceedings or it may,  
13      in its discretion, supplement the record by taking additional  
14      evidence. The final decision shall be transmitted to the  
15      agency, the employee, and the person requesting the review,  
16      and shall include a statement of findings and a recommenda-  
17      tion which shall be binding on the agency with respect to  
18      disciplinary action against the employee. (See also section 31  
19      of this title.)  
20      "(d) Except as provided in subsection (e), within sixty  
21      days after the issuance of a final decision on an administra-  
22      tive review, the person requesting the inquiry may petition  
23      for review of the final decision by a United States court of  
24      appeals, pursuant to chapter 158 of title 28, United States  
25      Code. The court may deny the petition, affirm the decision of

1 and vacate it or remand it for further proceedings if the court  
2 finds on the basis of its review of the record such decision to  
3 be arbitrary or capricious, or finds material factual determina-  
4 tions to be unsupported by substantial evidence. The  
5 court's review shall be held in camera for matters specifically  
6 protected from disclosure by statute, by Executive order re-  
7 lating to national security, national defense, or foreign affairs,  
8 or in the court's own discretion if it determines that in  
9 camera review is necessary. ~~§ 1361(a)(2) (b)(2)~~  
10 ~~and~~ (e) The right to request an administrative review under  
11 subsection (c) and to petition for judicial review under subsec-  
12 tion (d) or section 7804(c) of this title shall not be available to  
13 a person who has not obtained a monetary recovery from the  
14 United States on a claim under section 2675 of title 28 or in  
15 an action under section 1346(b) of title 28 arising under the  
16 Constitution of the United States, unless the agency which  
17 conducted the inquiry under subsection (b) of this section con-  
18 sents in its sole and unreviewable discretion to that person's  
19 requesting administrative or judicial review.~~§ 1361(b)~~  
20 ~~(f)~~ An employee who is not entitled under other provi-  
21 sions of law to seek administrative or judicial review of disci-  
22 plinary action taken against him may, if an administrative  
23 review is conducted under subsection (c) of this section, par-  
24 ticipate in such review and give evidence or testimony if a  
25 hearing is held; and, to the extent provided by subsection (d),

1 of this section, may petition for judicial review of a final deci-  
2 sion if any disciplinary action recommended under subsection  
3 (c) of this section is greater than that proposed by the em-  
4 ploying Federal agency.  
5 (g) If an inquiry under this section is requested with  
6 respect to conduct alleged to have occurred while the em-  
7 ployee was employed by an agency other than that agency by  
8 which he is employed at the time the inquiry is requested,  
9 then the agency by which he was employed at the time the  
10 conduct was alleged to have occurred shall conduct an in-  
11 quiry pursuant to this section and forward its findings and  
12 recommendations to the agency by which he is presently em-  
13 ployed. The head of the agency by which he is employed  
14 shall, after reviewing the findings and recommendations of  
15 the agency conducting the inquiry, take such action as he  
16 deems appropriate. For the purposes of determining the  
17 forum for administrative review under subsection (c) of this  
18 section and section 7805(a) of this title, the employee shall be  
19 considered to be an employee of the agency conducting the  
20 inquiry.

21 (h) This section does not apply to Presidential appoint-  
22 ees and former employees who are covered by section 7804  
23 of this title.

-1 "§ 7804. Conduct of Presidential appointees and former  
-2 employees." In an action brought against a former employee or  
-3 former Presidential appointee of the President based upon a  
-4 tort claim arising under the Constitution of the United  
-5 States, the United States, upon the certification of the Attorney  
-6 General as provided by section 2679(d) of title 28, shall  
-7 be substituted for the former employee or former Presidential  
-8 appointee as a defendant in such action, provided the former  
-9 employee or former Presidential appointee has agreed to  
-10 submit to the disciplinary procedures set forth in this chapter  
-11 with respect to employees. If the former employee or former  
-12 Presidential appointee elects to subject himself to such disci-  
-13 plinary procedures, the discipline that may be imposed shall  
-14 be limited to a reprimand or a civil penalty not to exceed  
-15 one-twelfth of the former employee's or former Presidential  
-16 appointee's average annual Federal salary earned during the  
-17 period in which the act or omission occurred for which such  
-18 employee or appointee is being disciplined.

-19 "(b) A request under section 7802 of this title for an  
-20 administrative inquiry with respect to the conduct of a Presi-  
-21 dential appointee shall be made to the appropriate individual  
-22 or body described in section 7805(a) of this title, who shall  
-23 conduct such inquiry without unnecessary delay. If after pre-  
-24 liminary inquiry the individual or body finds that the matter

1 is so lacking in substance or so unsubstantiated as not to  
2 warrant further inquiry, it may, upon notice to the person  
3 requesting the inquiry under this section terminate such in-  
4 quiry. A hearing shall be held with respect to the conduct of  
5 the appointee if there is a genuine, material, and substantial  
6 dispute of fact which can be resolved with sufficient accuracy  
7 only by the introduction of reliable evidence in a hearing and  
8 the decision of the individual or body in the matter is likely to  
9 depend on the resolution of such dispute. In its sole and unre-  
10 viewable discretion, the individual or body may give to a  
11 person or a Presidential appointee, or both, in the event of a  
12 hearing, the opportunity to examine and cross-examine wit-  
13 nesses, and to suggest witnesses to be called and documents  
14 to be produced. This discretion shall not be construed to pro-  
15 vide access by unauthorized persons to information specifi-  
16 cally protected from disclosure by statute, or by Executive  
17 order, relating to the national security, national defense, or  
18 foreign affairs. The individual or body shall issue a statement  
19 of findings and recommend appropriate disciplinary action, if  
20 any, to the President.  
21 "(c) A former employee or former Presidential appointee  
22 who has been assessed a civil penalty under subsection (a) of  
23 this section and, except as provided by section 7803(c) of this  
24 title the person who requested the inquiry or hearing under  
25 subsection (a) of this section may, within sixty days after the

1 issuance of a final decision by the individual or body conduct-  
2 ing the inquiry under subsection (a); petition for review of the  
3 final decision by a United States court of appeals pursuant to  
4 chapter 158 of title 28. The court may deny the petition,  
5 affirm the decision, or set aside such decision and vacate it or  
6 remand it for further proceedings if the court finds on the  
7 basis of its review of the record such decision to be arbitrary  
8 or capricious, or finds material factual determinations to be  
9 unsupported by substantial evidence. The court's review shall  
10 be held in camera for matters specifically protected from dis-  
11 closure by statute, by Executive order relating to the na-  
12 tional security, national defense, or foreign affairs, or in the  
13 court's own discretion if it determines that in camera review  
14 is necessary.

15 "(d) In any action to collect a civil penalty imposed

16 under subsection (a), the validity and appropriateness of the  
17 final order imposing the penalty shall not be subject to

18 review.

19 § 7805. Individuals and bodies conducting inquiries and

20 review

21 "(a)(1) An administrative inquiry under section 7804 of

22 this title or an administrative review under section 7803(c) of,

23 this title shall be conducted by the following persons:

24 "(A) The head of an agency with a personnel

25 system under the Foreign Service Act of 1946.

1 U.S.C. 801), or his designee, with respect to an officer

2 or employee of the Foreign Service.

3 "(B) The head of an agency with a personnel

4 system under the Public Health Service Act (42

5 U.S.C. 201), or his designee, with respect to an officer

6 or employee of the Public Health Service.

7 "(C) A body designated by the President within

8 sixty days of enactment of this chapter, other than the

9 Central Intelligence Agency, the Federal Bureau of In-

10 vestigation, the National Security Agency, the national

11 intelligence components of the Defense Department or

12 the National Security Council and its component parts,

13 with respect to an officer or employee who is deter-

14 mined by the agency employing him at the time the

15 conduct is alleged to have occurred to have been en-

16 gaged in intelligence activities.

17 "(D) The Merit Systems Protection Board, or its

18 designee, in any other case.

19 "(2) Notwithstanding the provision of paragraph (1) of

20 this subsection, in the case of administrative review under

21 section 7803(c) of this title, such review shall be conducted

22 by the Merit Systems Protection Board if the employee has

23 and chooses to exercise any right of review before the Merit

24 Systems Protection Board of the disciplinary action which he

25 would have under another provision of law. The Merit Sys-

1 items Protection Board, may, in its discretion, refer any  
2 matter before it as a result of this chapter to the Special  
3 Counsel of the Merit Systems Protection Board for the pur-  
4 pose of taking evidence or making recommendations, or both.

5 and "(b) A designee of a Secretary, agency head, or entity  
6 described in this section, who conducts an administrative  
7 review shall not be responsible to or subject to the supervi-  
8 sion or direction of any designee of the agency who con-  
9 ducted the administrative inquiry under review.

10 (c) No person who has been an employee of the Cen-  
11 tral Intelligence Agency, the Federal Bureau of Investiga-  
12 tion, the National Security Agency, the national intelligence  
13 components of the Defense Department, or the National Se-  
14 curity Council or its component parts during the preceding  
15 two years may be appointed to serve on the body designated  
16 to conduct an administrative review under subsection

18 "§7806. Regulations" 81

19 "(a) Within ninety days after enactment of this chapter,  
20 the individuals and bodies described in section 7805(a) of this  
21 title shall issue such regulations as are necessary and appro-  
22 priate for the implementation of sections 7803(c), 7804, and  
23 7805 of this title.

- 1        "(b) Regulations issued by the Merit Systems Protection
- 2        Board under this section shall be approved by the Attorney
- 3        General.
- 4        "(c) The head of each agency subject to the administra-
- 5        tive review provisions of section 7803(c) of this title shall
- 6        comply with the regulations issued by the particular adminis-
- 7        trative body designated by section 7805(a) of this title to
- 8        review administrative inquiries conducted by the Federal
- 9        agency pursuant to section 7803(b) of this title, and shall,
- 10       sixty days after the effective date of such regulations, issue
- 11       rules, regulations, and instructions not inconsistent there-
- 12       with:
- 13       "(d) For purposes of promulgating regulations pursuant
- 14       to this section, the body designated under subsection (e) of
- 15       section 7805 of this title shall be an 'agency' of the Govern-
- 16       ment within the meaning of section 551 of this title.
- 17       "(e) All regulations issued under this section shall be
- 18       subject to the public comment provisions of section 553 of
- 19       this title, notwithstanding subsection (a) of such section 553,
- 20       and subject to judicial review under chapter 7 of this title.
- 21       The court's review shall be held in camera for matters spe-
- 22       cifically protected from disclosure by statute, or by Executive
- 23       order relating to the national security, national defense, or
- 24       foreign affairs, or in the court's own discretion if it deter-
- 25       mines that in camera review is necessary.

1 "§ 7807. Miscellaneous

2        "(a) Nothing in this chapter shall affect the rights of an  
3 employee to appeal or to seek review or other means of re-  
4 dress of any disciplinary action which he would have under  
5 other provisions of law, except that an employee who is the  
6 subject of a disciplinary action recommended by the Merit  
7 Systems Protection Board pursuant to subsection 7803(c) of  
8 this title, shall not be required by any other provision of law  
9 to take an appeal to the Merit Systems Protection Board  
10 prior to seeking judicial review of that action.

11       "(b) Nothing in this chapter shall affect the availability  
12 of defenses which an employee may raise in any administra-  
13 tive or judicial proceeding.

14       "(c) Nothing in this chapter shall require a Federal  
15 agency to delay taking disciplinary action against an em-  
16 ployee, or empower the Merit Systems Protection Board to  
17 reduce the severity of disciplinary action taken by an agency  
18 against an employee who would not have a right to seek the  
19 Merit Systems Protection Board's review of such action  
20 under other provisions of law.

21       "(d) Nothing in this chapter shall authorize a Federal  
22 agency to delay or refrain from taking disciplinary action  
23 against an employee in the absence of a request filed under  
24 section 7802-(a) or (b) of this title.

1        "(e) Notwithstanding any other provision of law, any  
2 party who was a complainant in or the subject of a discipline  
3 proceeding may, in an action for judicial review of agency  
4 action under section 7803(d) of this title, recover reasonable  
5 attorneys' fees, fees and reasonable costs of experts, and  
6 other reasonable costs of litigation, including taxable costs,  
7 incurred during judicial review if the court affords such  
8 person the relief sought in substantial measure."

9        (b) The table of chapters for title 5, United States Code,  
10 is amended by inserting immediately after the item relating  
11 to chapter 77 the following new item:

12        "78. Employee Discipline..... 7801".

13        SEC. 13. (a) This Act shall apply to all claims and ac-  
14 tions filed after the date of enactment of this Act, and to all  
15 claims and actions pending on the date of enactment. In any  
16 known to an aggrieved party on or before the date of enact-  
17 ment of this Act, such aggrieved party, claimant, or plaintiff  
18 may elect to retain his right to a jury demand if made prior to  
19 the date of enactment in the case of a plaintiff who has filed  
20 an action, or if such right has not expired by the date of  
21 enactment, in the case of such plaintiff, claimant, or ag-  
22 grieved party. In the case in which a plaintiff elects to retain  
23 his right to jury demand, the amendments made by section 3  
24 of this Act to section 2674 of title 28, United States Code,

1 relating to liquidated damages, waiver of absolute or qualified  
2 immunity, and attorneys' fees, shall not apply.  
3 (b)(1) Except as provided in paragraph (2), in the event  
4 a case is pending on appeal on the date of enactment of this  
5 Act, it shall be remanded to the appropriate district court for  
6 further proceedings in accordance with the amendments  
7 made by this Act, upon certification by the Attorney General  
8 that the defendant employee was acting within the scope of  
9 his office or employment, or that he was acting solely under  
10 the color of his office or employment, at the time of the inci-  
11 dent out of which the action arose.

12 (2) In the event that the appeal was taken from a judg-  
13 ment rendered in favor of a plaintiff, the judgment shall be  
14 binding on the United States in any case in which it is substi-  
15 tuted as a defendant.

16 SEC. 14. (a) This Act is effective for a five-year period  
17 beginning on the date of enactment of this Act. Five years  
18 from the date of enactment of this Act, the provisions in  
19 effect on the day before the date of enactment of this Act  
20 shall be revived, notwithstanding provisions of section 108 of  
21 title 1, United States Code. Any claim, action, or disciplinary  
22 action filed or initiated during the five-year period shall not  
23 be affected by the termination of such period.

24 (b) Six months prior to the termination date of the provi-  
25 sions of this Act, the Attorney General and the Office of

- 1 Personnel Management shall submit a report to the President
- 2 of the Senate and the Speaker of the House of Representa-
- 3 tives setting forth his recommendations on whether the provi-
- 4 sions of this Act should be continued.

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